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Supreme Court U.S.

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In The

# Supreme Court of the United States

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NELSON FERNANDES

*Petitioner,*

v.

K. and J. Construction.

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On Petition for Writ of Certiorari
To The Supreme Court of New Jersey

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## PETITION FOR WRIT OF CERTIORARI

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Nelson Fernandes – Pro se
9 Fox Run
Denville, N.J. 07834
(973) 627 –2138

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44 pp

## Questions Presented for Review

1. Is petitioner entitled to a second appeal as of right and did the N.J. Supreme Court deny him that right in violation of due process and the cited authorities.

2. Does the denial of the petition for certification constitute a decision on a federal question since the petition involved an ex parte communication between a judge and attorney that resulted in a denial of due process by infecting the outcome, and does that denial provide this Court with jurisdiction.

3. Is the N.J. Supreme Court in conflict the authorities cited by the petitioner.

4. Was there an ex parte communication that infected the decision, was petitioner prejudiced by it, and did the judge transcend the power conferred by law or did he cause a structural error which deprived him of jurisdiction.

5. Is a judge deprived of jurisdiction when he exceeds the authority provided by law, and does raising that issue at any point during an appeal require that trial result be set aside for a lack of subject matter jurisdiction.

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| | |
|---|---|
| P | Ex parte communication and proof of prejudice |
| Q | Quantum Meruit not permitted w/o rescission |
| R | Section on allowing interest w/o due process |
| S | Section asking the Court to reconsider its order |
| T | Appellate Division avoided the ex parte issue |

## Statement on the Orders Entered

| | |
|---|---|
| 12/12/02 | S.C. Petition for Certification Denied |
| 09/19/02 | S.C. Order granting leave to file as timely and converted notice of appeal as of right |
| 06/04/02 | A.D. Order denying Reconsideration |
| 03/18/02 | A.D. Order granting extension of time |
| 02/04/02 | A.D. Order and Opinion (omits ex parte issue) |
| 02/05/01 | L.D. Order denying recusal motion & other relief |
| 12/81/01 | L.D. Judgment |
| 11/06/00 | A.D. Denying Leave to Appeal |
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## Statement of the Basis for Jurisdiction

Petitioner seeks a review of the N.J. Supreme Court's 12/12/02 order denying a petition for certification pursuant to 28 USC 1257, 2101, 2104 & 2106. The N.J. Supreme Court denied petitioner an appeal as of right and reconsideration (Pa.S) in violation of due process. Then denied certification to consider an ex parte communication between the trial judge and the attorney for plaintiff, which prejudiced the outcome, thereby deciding a federal question on two separate occasions.[1]

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[1] "It is not necessary that the express language of the opinion should recite that a Federal question has been decided, but it is sufficient for the purpose of the jurisdiction of this court, that the state court by its decisions necessarily adjudicates the defense under the Federal Constitution." *Cedar Rapids Gas Light Co. v. City Cedar Rapids*, 223 U.S. 655 (1912).

## Constitutional Provisions

Article VI, Section V, Par. 1(a)&(e) of N.J.'s Constitution allows appeals to be taken to the Supreme as follows:

1. Appeals may be taken to the Supreme Court:

(a) In causes determined by the appellate division of the Superior Court involving a question arising under the Constitution of the United States or this State;

(e) In such causes as may be provided by law.

## Statement of the Case

This case involves a contract matter, a consumer fraud counterclaim, and damage to petitioner's home as the result of careless workmanship. The case was tried in the Law Division before a judge who violated due process by allowing an ex parte communication by plaintiff's attorney, which appears in the record. This communication prejudiced petitioner's rights and infected the outcome of the trial. (Pa.P) The trial judge also surprised petitioner by raising the resulting quantum meruit claim, thus aligning himself with the plaintiff. (Pa.Q) Moreover, the judge allowed pre and post-judgment interest without a hearing on notice, (Pa.N&O) again denying petitioner due process. (Pa.R) This conduct shows the degree of influence and prejudice that resulted from the ex parte communication.

Petitioner argued the ex parte issue to the appellate court in his opening brief and his brief on reconsideration (Pa.C). However, the appellate division refused to rule on the issue, even though plaintiff's attorney did not dispute the fact that he had an ex parte communication with the judge. Petitioner then sought a second appeal as of right in the Supreme Court. Upon calling the clerk's office for notice requirements, petitioner was told the time to file a notice had run, although petitioner had an order extending the time (Pa.D) which would make filing timely. Nevertheless, petitioner was required to file a motion for leave to timely file, or have his notice of appeal refused.

Petitioner filed a notice of appeal and a motion for leave to accept the notice as within time. (Pa.K&L) Petitioner did not present his grounds for appeal (Pa.M) since *R.*2:2-1(a) allows it as of right, so leave is not required. The Supreme Court granted leave on the timeliness issue, but violated due process by treating the notice of appeal as of right as notice for a petition for certification though it was not part of the brief (Pa.B). The order denying petitioner his right to an appeal as of right violated due process the instant it was entered. That act and the subsequent denial of the petition for certification makes the Supreme Court's action appear to be a denial of substantive due process motivated by an institutional bias, bad faith or improper motive.

## I - Reasons for Granting this Petition

### The Supreme Court Denied Petitioner His Appeal as of Right

Petitioner filed a notice of appeal as of right (Pa.K) and a motion [2] for "leave to file that notice as within time" (Pa.L). The Supreme Court found the notice was timely. But, exceeded its authority by converting the notice into one for a petition for certification. By so doing, it violated Article VI, Section V, Par. 1(a) of the N.J. constitution, *R.*2:2-1,[3] and a Supreme Court ruling, which allows a second appeal as of right without the need for leave if a party wants it.[4] Therefore, the Supreme Court

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[2] A "motion" is defined as "a written or oral application requesting a court to make a specified ruling or order." Black's Law Dictionary 1031 (7th ed. 1999) *Application of Winterhawk Outfitters, Inc. v. Office of Outfitters Registration*, 43 P.3d 745 (Colo.App. 02/14/2002).

[3] "*R.* 2:2-1. Appeals to the Supreme Court from Final Judgments (a) As of Right. Appeals may be taken to the Supreme Court from final judgments as of right: (1) in cases determined by the Appellate Division involving a substantial question arising under the Constitution of the United States or this State."

[4] **"The very limited provision for double appeals without leave** arises as an aspect of the new judicial structure of this State created by the Constitution of 1947, which is based on the sound tenet of judicial administration that there should ordinarily be only one appeal as of right. Midler v. Heinowitz, 10 N.J. 123, 129 (1952). The exception of additional review in cases involving constitutional questions has to be based on the thinking that matters of interpretation or application of the organic documents of government and of **fundamental rights and obligations warrant a second judicial look if the losing party wants it because they are intrinsically of basic importance.**

denied petitioner due process, the instant it entered its order (Pa.B).[5] The right to appeal as of right is clearly protected by the due process clause.[6] So, an appeal as of right is not subject to a motion for leave or the Supreme Court's discretion.[7]

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*Tidewater Oil Co. v. Mayor and Council of Borough of Carteret*, 44 N.J. 338, 341-42 (N.J. 04/12/1965).

[5] "Such a result is equally consistent with our cases **holding a violation of due process to be complete when a defendant is denied a right to the appeal he is otherwise entitled to pursue.** See Peguero v. United States, 526 U. S. 23, 30-31 (1999) (O'Connor, J., concurring). *Smith v. Robbins*, 120 S.Ct. 746, 528 U.S. 259, 145 L.Ed.2d 756 (U.S. 01/19/2000)

[6] "The Supreme Court has found that the Due Process clause protects the right to direct appeal when that right is guaranteed by the state, even though the Constitution does not require states to grant that right. See, e.g., Evitts, 469 U.S. at 393. Due process requires that a right to appeal be a right to an "'adequate and effective' appeal" which is "more than a 'meaningless ritual.'" Id. at 393, 394 (quoting Griffin v. Illinois, 351 U.S. 12, 18, 100 L. Ed. 891, 76 S. Ct. 585 (1956), and Douglas v. California, 372 U.S. 353, 358, 9 L. Ed. 2d 811, 83 S. Ct. 814 (1963)). Due process further protects not only the right "to obtain a favorable decision," but also the right "to obtain a decision at all . . . on the merits of the case." Evitts, 469 U.S. at 395 n.6." *Burkett v. Cunningham*, 826 F.2d 1208 (3rd Cir. 07/10/1987).

[7] "Sun Valley's appeal to the district court was not subject to the discretion of the district court; rather, it was an appeal as of right, properly before the district court." *In re Sun Valley Foods Co.*, 801 F.2d 186 (6th Cir. 09/11/1986); *Fleck v. E.F. Hutton Group Inc.*, 873 F.2d 649 (2nd Cir. 05/04/1989) ("since congress has now granted defendants an appeal as of right, it is unnecessary for us to exercise our discretion"); *Korea Shipping Corp. v. N.Y. Shipping Assoc.*, 811 F.2d 124 (2nd Cir. 02/04/1987) ("where a district court balances the equities of a particular situation guided

**The Ex Parte Communication Prejudiced the Outcome**

Petitioner sought a second appeal as of right because the appellate division twice refused to address the trial judge's ex parte communication with plaintiff's attorney. That contact prejudiced [8] petitioner by infecting the outcome of the trial, thus proving a due process violation. So, refusal to grant the petition for certification was a decision on a federal question that conflicts with the law of a number of circuit courts.[9]

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by no more than its own conscience, an immediate appeal as of right is a prudent safeguard against possible abuses of discretion"); *Epperson et al. v. Arkansas*, 393 U.S. 97 (11/12/68) ("the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.")

[8] "Proof of prejudice is generally a necessary but not sufficient element of a due process claim." *U.S. v. Lovasco*, 431 U.S. 783, (1977).

[9] "In the absence of any showing that the (ex parte communication) infected the fact-finder's determination of the issues at trial, we hold that the challenged practice did not violate the petitioner's rights to due process of law." *Grieco v. Meachum*, 533 F.2d 713 (1st Cir. 04/07/1976), cert. denied, 429 U.S. 858 (1976); *Simer v. Rios*, 661 F.2d 655 (7th Cir. 10/07/1981) (same); *U.S. v. Earley*, 746 F.2d 412 (8th Cir. 10/11/1984) (same); *U.S. v. Adams*, 785 F.2d 917 (11th Cir. 03/31/1986) (same); *Blank v. Dept. of the Army*, 247 F.3d 1225 (Fed. Cir. 04/19/2001) ("only ex parte communications that introduce new and material information to the deciding official will violate the due process guarantee of notice."); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993) ("a judge will thus be guarded from engaging in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation").

**The Petition for Certification was a Sham**

The Supreme Court deprived petitioner of an appeal as of right (Pa.B), and declined to reconsider that issue in the petition for certification (Pa.S). It also disregarded petitioner's arguments for granting certification, making that hearing a sham. [10]

The petition shows the judge admitted to an ex parte communication (Pa.P) with plaintiff's attorney, raised a quantum meruit claim for plaintiff as a result, decided the case in plaintiff's favor based on the quantum meruit claim (Pa.P), and allowed pre and post judgment interest (Pa.R) without a hearing. Nor did plaintiff's attorney ever deny the ex parte communication. Petitioner also showed the appellate division refused to address the ex parte communication (Pa.T).

Therefore, the elimination of the appeal as of right and the Supreme Court's denial of the petition for certification appears to be a denial of substantive due process, motivated by an institutional "bias, bad faith or improper motive." [11]

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[10] "The hearing, moreover, must be a real one, not a sham or a pretense." *Palko v. Connecticut*, 302 U.S. 319, 327.

[11] ""[a] violation of substantive due process rights is proven: . . . 'if the government's actions in a particular case were in fact motivated by bias, bad faith or improper motive. . .,'" id. (quoting Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 683 (3d Cir. 1991), cert. denied, 503 U.S. 984 (1992)), Homar points to several facts that he argues demonstrate that his suspension and

The judge said he ruled as follows (Pa.P);

> THE COURT: I found in your favor on that issue. I said it was unlawful, and **I said he couldn't recover under the contract. But I said he could recover on quantum meruit.** (2T16,10-13)

This shows the ex parte communication that resulted in the quantum meruit claim ambushed the petitioner.[12] It further shows the judge allowed quantum meruit without rescinding the contract, thus transcending his authority. [13]

So, the Supreme Court's refusal to grant certification based on the foregoing is indicative of an institutional bias against retrial.[14]

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demotion were motivated by bias, bad faith or improper motive." *Homar v. Gilbert*, 89 F.3d 1009 (3d Cir. 07/18/1996).

[12] "**To permit last-minute changes in strategy would be "akin to trial by ambush.""***Humenik v. Gray*, 350 N.J.Super. 5, (A.D. 04/10/2002).

[13] "Having pleaded an express contract, the **plaintiff cannot without showing a rescission, recover on quasi-contract.** *Moser v. Milner Hotels Inc*, 6 N.J. 278 (1951); *C.B. Snyder Realty Co. v. Nat., Inc., Banking Co.* , 14 N.J. 146, 162-3 (1952).

[14] "The decisions in these cases reflect a recognition by the Court of the institutional bias inherent in the judicial system against the retrial of issues that have already been decided. The doctrines of stare decisis, res judicata, the law of the case, and double jeopardy all are based, at least in part, on **that deep-seated bias . . the same institutional pressure that supports them might also subconsciously motivate a . . judicial response to a defendant's exercise of his right to obtain a retrial of a decided question.** *U.S. v. Goodwin*, 457 U.S. 368 (1982).

**Abdication of Jurisdiction and Structural Error**

The judge aligned himself with the plaintiff [15] by raising a quantum meruit claim as the result of an ex parte communication with the attorney. So, the trial judge transcended the power conferred by law [16] and displayed a bias that constitutes a structural error, [17] causing a defect in jurisdiction, which can be raised at any time.[18]

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[15] *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155 (3d Cir. 1993) ("A judge will thus be guarded from engaging in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation").

[16] "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. **It must act judicially in all things, and cannot then transcend the power conferred by the law.**" *Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 281 (1912).

[17] "We have found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." . . . Tumey v. Ohio, 273 U. S. 510 (1927) (biased trial Judge)." *Neder v. U.S.*, 527 U.S. 1, (1999).

[18] "It is well established that defects in subject matter jurisdiction may be raised at anytime on direct appeal. Mitchell v. Maurer, 293 U.S. 237, 244, 79 L. Ed. 338, 55 S. Ct. 162 (1934); 13 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3522 (2d ed. 1984)." *United Transportation Union and Robert M. Bannon v. Union Pacific Railroad Co.*, 812 F.2d 630 (10th Cir. 02/25/1987).

## CONCLUSIONS

The trial record shows the judge raised a quantum meruit claim as the result of an ex parte communication with plaintiff's attorney, and when questioned about it, the judge said; "I didn't raise it. It's been raised beforehand." (1T35-22) With the exception of the attorney blurting out the book number; "298" (1T37-23) there is nothing in the record to show the attorney raised this issue at trial, thus proving the phrase; "It's been raised beforehand" is an admission of an ex parte communication.

Therefore, the denial of the petition for certification indicates a judicial bias against retrial which penalizes petitioner for bringing the judge's admission of an ex parte communication that prejudiced petitioner's rights to the Supreme Court's attention. The Court's refusal to grant the petition in order to address this denial of due process [19] is fundamentally unfair since petitioner is only relaying that which appears in the record.

For all of the above stated reasons petitioner prays for this Court's consideration of this petition.

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[19] "By this doctrine all other courts in this country are, in effect, reduced largely to the role of automations, directed by us to apply mechanistically all then-settled federal constitutional concepts to every case before them." *Mackey v. U.S.*, 401 U.S. 667 (1971).

# A

| | |
|---|---|
| K & J Construction,<br>Plaintiff-Respondent,<br>v. | SUPREME COURT OF N.J.<br>C-435 September Term 2002<br>53,332 |
| Nelson Fernandes, et al.,<br>Defendants-Petitioners. | On Petition for Certification<br>Filed 12/12/02 |

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-3115-OO having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 10th day of December, 2002.

"S/Stephen Townsend"
Clerk of the Supreme Court

**B**

| | |
|---|---|
| K & J Construction,<br>Plaintiff-Respondent,<br>v. | SUPREME COURT OF N.J.<br>C-435 September Term 2002<br>53,332 |
| Nelson Fernandes, et al.,<br>Defendants-Petitioners. | ORDER<br>Filed 9/19/02 |

This matter having been duly presented to the Court, and the Court having determined that **movant has no basis to appeal as of right to this Court under Rule 2:2-1(a)**, it is hereby

ORDERED that movant's notice of appeal shall be deemed a notice of petition for certification; and it is further

ORDERED that movant's motion for leave to file the notice of petition for certification as within time (M-164) is granted; and it is further

ORDERED that movant shall serve and file his petition for certification within 10 days of the date of this Order, or the notice of petition will be dismissed for lack of prosecution.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 19th day of September, 2002.

"S/Stephen Townsend"
Clerk of the Supreme Court

# C

K&J Construction
vs
Nelson Fernandes

SUPERIOR COURT OF N.J.
APPELLATE DIVISION
DOCKET NO.A -003115-00T3
MOTION NO.M -003875-01
BEFORE PART: E
JUDGE(S): WEFING
LES EMANN
Filed June 4, 2002

MOTION FILED: APRIL 2, 2002 By: N. Fernandes
ANSWER(S) FILED:

SUBMITTED TO COURT: APRIL 4, 2002

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 31 st. DAY of MAY, 2002, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT FOR RECONSIDERATION DENIED

For the Court
"S/DOROTHEA. WEFING J.A.D."

# D

K&J Construction
vs
Nelson Fernandes

SUPERIOR COURT OF N.J.
APPELLATE DIVISION
DOCKET NO.A -003115-00T3
MOTION NO.M -003154-01
BEFORE PART: E
JUDGE(S): WEFING
LES EMANN
Filed March 18, 2002

MOTION FILED: FEBRUARY 15, 2002 By: N. Fernandes
ANSWER(S) FILED:

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 14 th. Day of March, 2003, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT GRANTED
- FOR STAY
- TO EXTEND TIME TO FILE A MOTION FOR RECONSIDERATION

SUPPLEMENTAL:

The motion for an extension of time is granted ape11ant may file a motion for reconsideration no later than May 1, 2002.

For the Court
"S/DOROTHEA. WEFING J.A.D."

**E**

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A—3115—00T3

K & J Construction,
Plaintiff-Respondent,
v.

Nelson Fernandes, et al.,
Defendants-Petitioners. Filed 2/04/02

Submitted January 8, 2002 - Decided FEB 4, 2002
Before Judges Wefing and Lesemann.
On appeal from Superior Court of New Jersey, Law Division, Morris County, MRS-L-001821-98. Nelson A. Fernandes, appellant pro se.
Advokat & Rosenberg, attorneys for respondent (Jeffrey M. Advokat, on the brief).

**PER CURIAN**

This appeal arises from a contract between plaintiff and defendant by which plaintiff undertook to install a new roof and perform certain related work on defendant's house. The written contract called for a total price of $6,300. Plaintiff, however, claimed that the parties orally agreed on some additional work and that the total job price would thus be increased by $1,400, to a total of $7,700. Defendant paid plaintiff $3,200 when the contract was signed. Plaintiff undertook to perform the contract and subsequently brought this suit, claiming that he had completed the work and seeking recovery of the unpaid $4,500.

At trial, much of the evidence dealt with the $1,400 represented by the alleged oral modification of the parties' written agreement and claims by defendant that plaintiff had not properly performed the work. The trial was by the court without

a jury. At the conclusion thereof, the court rendered its decision for plaintiff in the sum of $3,100, rejecting plaintiff's claim for the additional $1,400 under the alleged oral modification to the contract. The court also awarded plaintiff pre-judgment interest of $454, and entered judgment accordingly in favor of plaintiff.

With one exception, we are satisfied that the trial court's findings and the judgment based thereon are adequately supported by the evidence and there is no warrant for our intervention. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 477, 484 (1974). Nor is there any need for us to discuss that point any further in this opinion. R. 2:11—3(e)(1)(A).

The exception to that conclusion relates to defendant[1]'s claim that plaintiff failed to take necessary precautionary measures to protect the brick work on the house while the old roof shingles were being removed. Defendant testified that plaintiff was "suppose to put protection around the house for the brick work" but, although he did take protective measures concerning the plants around the house, he did not do so with respect to the bricks. As a result, defendant claimed,

> when they were tearing off the shingles the house got completely marked up from tar from the shingles that were coming down. And I tried to remove it by hand with a couple different chemicals but I was unsuccessful. And I brought it to Kevin's (plaintiff's) attention and he went like, yeah, so what? And he begged off of any responsibility for the damage that was done to the house. So ultimately, we had to have the exterior of the house steam cleaned in order to have those marks removed.

Defendant said he spent $424 for that steam cleaning, and he introduced a bill for that amount into evidence.

At trial, other than a general statement that plaintiff properly performed its contract obligations, plaintiff made no reference to defendant's claim concerning the need to clean the

brick on his house. In its decision, the court rejected the allegation, saying this:

> First of all, if somebody wanted to have protection for the bricks it should have been in the contract. It wasn't in the contract. Now another oral agreement. Well, there's no proof of an oral agreement. And so I'm not going to award anything for the steam cleaning after all the entire house was steam cleaned for, from what I can see, a couple minor areas of concern where bricks may have been discolored with tar.

We disagree with that conclusion. We can *see* no need for a contract provision specifically providing for reasonable protection for the brick on defendant's house. Rather, the basic necessity for careful performance of the work and avoidance of any resulting damage to the remainder of the house would certainly include an obligation to avoid smearing the brick siding with tar from the roof shingles. Nor do we see any basis for the court's conclusion that there were only "a couple minor areas of concern." Defendant described a much more extensive area of damage and, as noted, plaintiff said nothing on the subject. The bill presented for the cleaning referred to "tar removal from brick," and nothing was presented to question the bona f ides of the bill, the necessity for the work, or the actual performance of the work.

We are satisfied that the judgment in plaintiff's favor should be reduced by the $424 representing the cost of removing the tar from the brick siding, which would also require an appropriate modification in the prejudgment interest awarded to plaintiff. With those changes, the remainder of the award is appropriate and, accordingly, the matter is remanded to the trial court for entry of a modified judgment consistent with this opinion.

"s/Jim Flynn"

Clerk of the Appellate Court

# F

Nelson Fernandes – Pro Se
9 Fox Run
Denville, N.J. 07834

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| K & J Construction, | Superior Court of N.J. |
| Plaintiff, | Law Division – Morris County |
| v. | DKT NO: MRS-L-001821-98 |
| Mr. & Mrs. Wilson Fernandes; | ORDER |
| Defendants. | Filed Feb. 5, 2001 |

**THIS MATTER** having come before the Court for a hearing held on January 3, 2000 on the motion of defendant requesting an order for various relief. This matter having been fully submitted and heard, and for good cause shown;

IT IS on this 2 nd. Day of February, 2001

1.ORDERED that defendant's motion for new trial is hereby denied;

2.ORDERED that defendant's motion to amend the judgment is denied;

3.ORDERED defendant's motion for amended findings and conclusions of law is denied;

4.ORDERED that defendant's motion for treble damages is denied in the amount of $ 3,445.00;

5.ORDERED that defendant's motion for recusal is hereby denied.

"S/David S. Cramp"

Judge Cramp

# G

ADVOKAT & ROSENBERG, ESQS,
Attorneys at Law
22 North Park Place
Morristown, New Jersey 07960
(973) 993-1923
Attorneys for Plaintiff

| | |
|---|---|
| K & J Construction, | Superior Court of N.J. |
| Plaintiff, | Law Division – Morris County |
| v. | DKT NO: MRS-L-001821-98 |
| | Civil Action |
| Mr. & Mrs. Wilson Fernandes; | JUDGMENT |
| Defendants. | Filed Dec. 18, 2000 |

THIS MATTER, having been brought before the Court on November 27, 2000, in the presence of ADVOKAT & ROSENBERG, ESQS. counsel for the plaintiff, K & J Construction, (Jeffrey M. Advokat, Esq. appearing) and with the defendants representing themselves, and after full trial, and for good cause having been shown;

IT IS on this 17 day of December 2000

ORDERED AND ADJUDGED, that Judgment be entered in favor of K & S Construction, in the amount of Three Thousand, one hundred dollars ($3,100.00) plus prejudgment interest in the amount of Four Hundred, fifty-four dollars $ 454.00 as well as post judgment interest until the date of satisfaction.

"S/David S. Cramp"
Hon. David S. Cramp J.S.C.

# H

K&J Construction
vs
Nelson Fernandes

SUPERIOR COURT OF N.J.
APPELLATE DIVISION
DOCKET NO.AM -000057-00T3
MOTION NO.M -000404-00
BEFORE PART: H
JUDGE(S): Rodriguez
Fall
Filed November 6, 2000

Motion Filed Sept, 21, 2000 By; Nelson Fernandes
Answer(s) filed

Submitted to the Court Nov. 1, 2000

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 2 day of Nov., 2000, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT DENIED
- For Leave to Appeal
- For Stay
- To Vacate Order
- For Remand
- For Oral argument on motion
- Further Relief

"S/Ariel Rodgriguez"
Ariel A. Rodriguez J.A.D.

# I

Nelson Fernandes – Pro Se
9 Fox Run
Denville, N.J. 07834

| | |
|---|---|
| K & J Construction,<br>Plaintiff,<br>v. | Superior Court of N.J.<br>Law Division – Morris County<br>DKT NO: MRS-L-001821-98 |
| Mr. & Mrs. Wilson Fernandes;<br>Defendants. | ORDER<br>Filed Sept. 8, 2000 |

**THIS MATTER** having come before the Court for a hearing on September 8, 2000 on the motion of Defendant requesting an order to vacate the award of the arbitrator and ftirther requesting a dismissal of plaintiff's case This matter having been ftilly submitted and heard and for good cause shown;

IT IS on this 8 th. day of September, 2000;

ORDERED that Defendant's motion requesting the Arbitrator's award be vacated on the grounds that (handwriting is not legible)

ORDERED that defendant's motion for involuntary dismissal is denied.

1. All discovery must be completed by Oct. 1, 2000 by both sides.
2. Trial date Nov. 20, 2000.

"S/Bernard F. Conway"

**J**

Nelson Fernandes – Pro Se
9 Fox Run
Denville, N.J. 07834

| | |
|---|---|
| K & J Construction,<br>Plaintiff,<br><br>v.<br><br>Mr. & Mrs. Wilson Fernandes;<br>Defendants. | Superior Court of N.J.<br>Chancery Division –<br>Morris County<br>DKT NO: DC 2677 98<br>MRS C88 98<br>ORDER<br>Filed May 15, 1998 |

This matter comes to the attention of this court by way of motion. The court having considered the papers;

1. It is hereby ordered that defendant's answer and counterclaim, which inadvertently uses the term cross claim nn a subsequent page is hereby amended and is to be considered a counterclaim in keeping with the original designation on the first page.

2. It is further order that defendant's counterclaim is deemed to be requesting a declaratory judgment.

3. That this case is transferred to the Law Division because the amount of damages exceeds the statutory limit for Special Civil Part.

"S/ Kenneth C. McKenzie"
Kenneth C. McKenzie

# K

Nelson Fernandes – Pro Se
9 Fox Run
Denville, N.J. 07834
(973) 627-2138

| | |
|---|---|
| | : SUPREME CT. OF N.J. |
| Mr. & Mrs. Nelson Fernandes | : |
| Appellant, | : DKT. #: MRS L 001821 - 98 |
| vs. | : DKT. #:A – 003115 – 00T3 |
| | : |
| K&J Construction, | : |
| Respondent. | : NOTICE OF APPEAL |
| | : |
| | : |

**PLEASE TAKE NOTICE** that the appellant, Nelson Fernandes, is hereby filing a Notice of Appeal in the Supreme Court of New Jersey from the Appellate Court decision dated Feb. 4, 2002 and the denial of reconsideration dated June 4, 2002. Appellant appeals "as of Right" pursuant to R. 2:2-1(a)(1) and (4).

June 30, 2002 "S/Nelson Fernandes"

L

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(973) 627-2138

| | |
|---|---|
| | : SUPREME CT. OF N.J. |
| Mr. & Mrs. Nelson Fernandes | : |
| Appellant, | : DKT. #: MRS L 001821 - 98 |
| vs. | : DKT. #:A – 003115 – 00T3 |
| | : |
| K&J Construction, | : |
| Respondent. | : NOTICE OF MOTION |
| | : Leave to File a Notice of |
| | : Appeal as Within Time |

**Please Take Notice** that appellant is hereby moving before the Supreme Court for an order granting leave to file a notice of appeal as within time.

Appellant will rely on his certification and brief.

June 30, 2002 "S/Nelson Fernandes"

# M

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9 Fox Run
Denville, N.J. 07834
(973) 627-2138

| | |
|---|---|
| | : SUPREME CT. OF N.J. |
| Mr. & Mrs. Nelson Fernandes | : |
| Appellant, | : DKT. #: MRS L 001821 - 98 |
| vs. | : DKT. #:A – 003115 – 00T3 |
| | : |
| K&J Construction, | : Brief in Support of a |
| Respondent. | : Motion for Leave to File |
| | : a Notice of Appeal as |
| | : Within Time |

**I - An Extension of Time Pursuant to R. 2:4-4(a) and R. 1:1-2**

Appellant moves before this Court for an extension of time pursuant to R. 2:4-4(a) and R. 1:1-2. Appellant relies upon his certification and the case law in note 1,[1] which makes the following clear. First, R. 2:4-1 can be relaxed by R. 1:1-2.

[1] "It appears that petitioner's notice of appeal to this court was filed well beyond the time limited therefor by R. 2:4-1(b). By letter of March 27, 1978 to petitioner's then attorneys, with copy thereof to petitioner, the Chief of the Police and Fire Bureau of the Board gave notice of the Board's final administrative determination in the matter. It was not until December 6, 1978 that petitioner's notice of appeal was filed with the clerk of this court by his present attorney. No application for extension of time to file had been made under R. 2:4-4(a). We disapprove of this disregard of the pertinent rules of court. We note, however, that respondent, although mentioning the late filing, does not challenge the timeliness of the appeal. In the circumstances, and since we perceive substantial merit in the appeal, we proceed as if the appeal had been timely filed. R. 1:1-2." Toma v. State, 172 N.J.Super. 76, fn.1 (App.Div. 01/10/1980).

Second, that appellant filed a motion for an extension of time while dealing with a major illness out of respect for the rules, instead of disregarding R. 2:4-4(a). And is again doing so for the very same reason, instead of failing to observe the rules. (Exh. A). **Moreover, appellant makes no effort to prove his case has substantial merit at this point, since he is complying with the rules for good cause.** Whereas, this Court only overlooks the violation of the above rules when it "perceived substantial merit in the appeal." And lastly, respondent did not challenge appellant's motion before the Appellate Court.

## II – Allowing the Notice of Appeal Based on the Extension Granted

The Appellate Court granted an extension of the time that begins to run from its entry of the judgment, which is the same date used to toll the time for filing a notice of appeal in this Court. That extension allowed appellant to file a motion for reconsideration up to May 1, 2002. Appellant filed that motion on April 2, 2002, which leaves 30 days. Reconsideration was denied on June 4, 2002. Therefore, appellant moves to have this Court apply those 30 days to appellant's notice of appeal in this court based on its tolling rule. Appellant relies on the case law in footnote 2 in support of this argument.[2] Appellant respectfully

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[2] We undertake circumspectly our **review of the District Court's exercise of its equitable authority to excuse the late filings,** as the District Court's application of those powers is only reviewable by this Court for an abuse of discretion. See In re Cendant Corp. Prides Litig., 233 F.3d 188, 192 (3d Cir. 2000) (hereinafter "Cendant Prides I"); In re: Gypsum Antitrust Cases, 565 F.2d at 1128; cf. Dominic v. Hess Oil V.I. Corp., 841 F.2d 513, 516 (3d Cir. 1988) (employing an abuse of discretion standard to the review of a grant of extension of time to serve process). **We refrain from substituting our judgment for that of the District Court insofar as its holding is reasonable and supported by the evidence. "The test is not what this court would have done under the same circumstances; that is not**

submits that if this Court were to deny this motion, it will effectively be "substituting" its judgment for that of the appellate court on the validity of the merits. Filing two motions in different court's for an extension based on the same illness as it applies to the time that runs from the entry date of the judgment with different results would be fundamentally unfair and arbitrary.

June 30, 2002 "S/Nelson Fernandes"

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**enough. The court must feel that only one order could have been entered on the facts."** Gypsum Antitrust, 565 F .2d at 1128; see also Rode v. Dellarciprete, 892 F .2d 1177, 1182 (3d Cir. 1990) (finding an abuse of discretion "when no reasonable person would adopt the district court's view"). **"We will therefore not disturb an exercise of discretion` unless there is a "definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."** Hanover Potato Prods., Inc. v. Shalala, 989 F .2d 123, 127 (3d Cir. 1993) (citing Ferrero, U.S.A., Inc. v. Ozak Trading, Inc., 952 F.2d 44, 48 (3d Cir. 1991) (citation omitted)). **"An appellate court may find an abuse of discretion where the `district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.' "** In re Orthopedic Bone Screw Prod. Lia. Lit., 246 F.3d 315 (3d Cir. 2001).

# N

SUPERIOR COURT OF NEW JERSEY
Chambers of David S. Cramp, J.S.C.
P.O. Box 910
Morristown, N.J. 07963-0910
(973) 285-6434

Jeffrey Advokat, Esq
Advokat & Rosenberg
20 Park Place
Morristown, NJ 07960

Dec. 18, 2000

Re: K & J Construction v. Fernandes
Docket No. MRS—L—1821—98

Dear Mr. Advokat:

You will find enclosed a copy of a Judgment in this matter. By copy of this letter, I am advising Mr. Fernandes that the award of prejudgment interest is routinely made in these cases in accordance with Rule 4:42-11. Mr. Fernandes is also advised that although the Rule refers specifically to tort actions, there are a number of cases that have held that the Court may award prejudgment interest in contract actions, and the Courts routinely award prejudgment interest in contract actions.

Very truly yours,

David S. Cramp, J.S.C.

DSC: Jc encl.
cc: Mr. Nelson Fernandes

# O

Nelson Fernandes
9 Fox Run
Denville, N.J. 07834

Hon. David S. Cramp, J.S.C.
Morris County Courthouse
P.O. Box 910
Morristown, New Jersey 07963-0910

Re: K & J Construction v. Fernandes MRS-L- 001821-98

Dear Judge Cramp;

I received Mr. Advokat's proposed judgment dated Nov. 28, 2000 on Nov. 30, 2000. I am responding to say that it is incorrect since your honor made no award of prejudgment interest. Therefore, he should prepare a revised proposed form of judgment that reflects that fact.

Respectfully;

"S/Nelson Fernandes"

# P

**I –Ex Parte Contact was Prejudicial to the Administration of Justice**

The record shows an ex parte communication occurred. First, the judge said "a more recent Appellate Division decision." Mr. Advokat shouted "**298**." (1T37- 23) (Exh. E). The judge then said "**298** N.J. Super. 491" and raised a quantum meruit claim for him. Mr. Advokat's excited utterance [10] is a confessory pleading [11] since he knew the book the judge would cite before he spoke, proving an ex parte contact immediately before trial. That ex parte contact produced a quantum meruit claim that is not in the complaint, nor did Mr. Advokat file a brief on that issue, nor was there a pretrial conference and order. R.4:9-2. Nor did he deny the ex parte communication in a certification. When, appellant objected, the judge responded; "**I didn't raise it. It's been raised beforehand**." (1T35-22). However, there is no evidence of Mr. Advokat raising this issue "beforehand" in any manner, much less provide notice. His excited utterance and the judge's calculated statement proves an ex parte contact took place that is prejudicial to the administration of justice.[12]

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[10] "An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition and **without opportunity to deliberate or fabricate**". N.J.R.E. 803(c)(2)." Truchan v. Sayreville Bar and Restaurant, No. A-2996-97T3 (A.D. 07/09/1999).

[11] "An express waiver made in court or preparatory to trial by the party or his attorney conceding for the purposes of the trial that the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it and the other is not allowed to disprove it." Saltsman v. Corazo, 317 N.J.Super. 237 (App.Div. 12/29/1998).

[12] Canon 1 requires a Judge to uphold the integrity and independence of the judiciary; Canon 2 requires a Judge to avoid any impropriety or even an appearance of impropriety; . . . Canon 3A(6) prohibits a Judge from either initiating or considering ex parte or other

During appellant's post trial motion, the judge admitted that he allowed the ex parte communication on quantum meruit to affect his decision, thus denying due process,[13] though he lacked jurisdiction to raise and rule on quantum meruit since the contract was not rescinded.

> THE COURT: I found in your favor on that issue. I said it was unlawful, and **I said he couldn't recover under the contract. But I said he could recover on quantum meruit.** (emphasis added) (2T16,10-13), (Exh. C1)

**An ex parte conversation provides a legal basis for relief.** [14] It also constitutes an extra-judicial source,[15] which shows that claim was not based on "**what the judge learned**

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communications concerning a pending or impending proceeding. We find that respondent has violated Canons 1, 2, and 3, and has engaged in "conduct prejudicial to the administration of Justice that brings the judicial office into disrepute." R. 2:15-8(a)(6). Matter of Carton, 140 N.J. 330 (1995).

[13] **"(In) the absence of any showing that the (ex parte communication) infected the fact-finder's determination of the issues at trial, ... the challenged practice (does) not violate ... due process of law."** Grieco, supra, 533 F.2d at 719. Simer v. Rios, 661 F.2d 655 (7th Cir. 1981); U.S. v. Madrid, 842 F.2d 1090 (9th Cir. 1988) (same); U.S. v. Deleo, 422 F.2d 487 (1st Cir. 1970) (same); Alexander v. Primerica Holdings, Inc., 10 F.3d 155 (3d Cir. 1993) ("A judge will thus be guarded from engaging in ex parte discussions with counsel or aligning himself even temporarily with one side in pending litigation").

[14] "An ex parte conversation, which by definition deprives a defendant of the right to be heard, is also an **independent legal basis for relief from a judgment.** State v. Pruitt, No. 204, 2001 (Del. Sup. Ct. 03/28/2001).

[15] "An ex parte communication, as an extra-judicial source . . reasonably raised a question about the Judge's impartiality." Lamonts Apparel Inc. v. Si-Lloyd Assoc. 956 P.2d 1024 (Or.App.1998).

**from his participation in the case"** thus proving a disqualifying bias.[16] So, his bias renders this trial a structural error, which requires reversal. 3.A.(6). Neder v. U.S., 527 U.S. 1 (U.S. 1999)(biased judge).

[16] "The alleged bias and prejudice to be disqualifying must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. Berger v. United States, 255 U.S. 22, 31. Any adverse attitudes that Judge Wyzanski evinced toward the defendants were based on his study of the depositions and briefs which the parties had requested him to make. U..S. v. Grinnell Corp. et al., 384 U.S. 563 (06/13/66).

# Q

**III – Raising & Ruling on Quantum Meruit without Jurisdiction**

The complaint did not plead quantum meruit in the alternative,[23] so Mr. Advokat contacted the judge ex parte to raise that claim. But, he never rescinded the express contract,[24] as evinced by the judge's admitted ruling; "I said he couldn't recover under the contract. But I said he could recover on quantum meruit." (2T16, 10-13). Without rescission, his ruling is plain error. State in Interest of D.A.M., 132 N.J.S. 192 (A.D.1975). Without rescission, the judge lacked jurisdiction.[25] Appellant was also prejudiced in other ways. First, after 2 years & 9 months Mr. Advokat raises quantum meruit ex parte, thus ambushing [26] and surprising [27] appellant at trial with a claim that

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[23] "Even though one cannot prevail on both a contract claim and a quantum meruit (implied contract) claim covering the same services, our liberal approaches to pleading practice permit a party to seek relief on alternative grounds." Realty v. Bibbo, 329 N.J.Super. 528, (A.D. 2000).

[24] "Having pleaded an express contract, the **plaintiff cannot without showing a rescission, recover on quasi-contract**. Moser v. Milner Hotels Inc, 6 N.J. 278 (1951); C.B. Snyder Realty Co. v. Nat., Inc., Banking Co. , 14 N.J. 146, 162-3 (1952); Shapiro v. Solomon, 42 N.J.Super. 377, 385 (App.Div. 11/09/1956).

[25] "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. **It must act judicially in all things, and cannot then transcend the power conferred by the law.**" Standard Oil Co. of Ind. v. Missouri, 224 U.S. 270, 281 (1912).

[26] "**To permit last-minute changes in strategy would be "akin to trial by ambush.**""Humenik v. Gray, 350 N.J.Super. 5, (A.D. 04/10/2002).

[27] Band's Refuse v. Bor. of Fair Lawn, 62 N.J.S. 522, 553 (**"Surprise . . issues were injected into the case without notice or warning."**)

requires rescission, which appellant may have uncovered had he provided notice and the opportunity to **"prepare".**[28] Second, raising the equitable remedy of quantum meruit without rescinding the contract [29] and contacting the judge ex parte [30] violates due process. So, respondent's hands are unclean and should not have been granted relief as a wrongdoer,[31] who disrespects the law.[32] Third, the judge misled appellant when he objected (R. 4:9-2, R. Wilson P. & H., 246 N.J.Super. 615, 618 (A.D.1991)) by stating; "**I didn't raise it. It's been raised beforehand**." (1T35-22), making it appear that appellant was provided notice and the opportunity to prepare beforehand. Fourth, quantum meruit was not raised to conform to the evidence, since an express contract was being tried. (R. 4:9-2). Fifth, appellant was denied notice of the quantum meruit claim in advance of the trial date.[33] These injustices would require a new

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[28] "To comport with due process, a judicial hearing requires notice defining the issues and an adequate opportunity to prepare and respond" McKeown-Brand v. Trump Castle H& C, 132 N.J. 546 (N.J. 1993).

[29] "Any contractual claim for **equitable relief, for instance, quantum meruit**" Crowe v. De Gioia, 179 N.J.S. 36 (A.D. 1981).

[30] "An ex parte conversation, which by definition deprives a defendant of the right to be heard, is also an independent legal basis for relief from a judgment. State v. Pruitt, No. 204, 2001 (Del. Sup. Ct. 03/28/2001).

[31] "The doctrine of unclean hands . . "The essence of that doctrine . . . is that '[a] suitor in equity must come into court with clean hands and **he must keep them clean after his entry and throughout the proceedings.**'" Kingsdorf v. Kingsdorf, 351 N.J.S. 144 (A.D.05/20/2002).

[32] "Equity will never condone disrespect for the law." Switz v. Township of Middletown, 130 A.2d 15, 23 N.J. 580, 632 (N.J. 03/11/1957).

[33] "Cannot justify denial of a party's **fundamental right to notice in advance of the date set for a hearing of a contested matter on the merits**. This is elementary due

trial,[34] but for the fact that the judge ruled "he couldn't recover under the contract", which respondent did not cross-petition. Liberty Title and Trust Co. v. Plews, 6 N.J. 28 (N.J. 1950).

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process. Matter of Estate of Ernest Meyer, 63 N.J.Super. 336, 344 (A.D. 1960), aff., 35 N.J. 160 (N.J. 06/06/1961).

[34] "Once the trial court determines that a "manifest denial of justice" has occurred . . a new trial is warranted." Fertile v. St. Michael's, No. A-49 Sept Term 2000 (N.J. 2001).

R

## VI - Violations of Due Process on Prejudgment Interest

Though the Appellate Division removed post judgment interest, its failure to remove prejudgment interest remains a manifest injustice,[42] which requires a departure from the law of the case [43] for the reasons that follow. To begin with, appellant objected in writing to Mr. Advokat adding interest to the proposed order since it was not part of the court's disposition. (Exh. G) Otherwise, it would be plain error.[44]

**Appellant Was Denied Due Process** because he signed the order without notice and the opportunity to be heard [45] before taking his property interest in the money to be paid as interest.

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[42] A reviewing court should not disturb an exercise of discretion involving an award of prejudgment interest unless it represents a manifest denial of Justice. Coastal Grp v. Dryvit Sys. Inc., 274 N.J.S. 171 (A.D. 1994).

[43] "Under law of the case doctrine . . it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice." Az. v. Ca., 460 U.S. 605, fn.8 (1983).

[44] "Plain error, that is, the legal impropriety of the trial judge's finding prejudicially affected the substantial rights of defendant and was sufficient grievous to justify notice by us and to convince us that of itself the error possessed a clear capacity to bring about an unjust result. R. 2:10-2. State in Interest of D.A.M., 132 N.J.Super. 192 (A.D. 1975).

[45] "The most fundamental tenet of our legal system is that no man can be deprived of life, liberty or property without due process of law. . there can be no doubt that at a minimum it mandates that deprivations of liberty or property be preceded by an opportunity to be heard." Mullane v. Central Hanover, 339 U.S. 306. In re Farber, 78 N.J. 259 (N.J. 1978).

[46] The court abused its discretion since prejudgment interest is not a matter of right.[47]

**The Judge Lacked Jurisdiction** to grant interest since R. 4:42-1 limits the court to signing orders that memorialize its disposition. So, signing that order transcends the jurisdiction provided by that rule. Standard Oil Co. of Ind. v. Missouri, 224 U.S. 270, 281 (1912).

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[46] "A **property interest in the money** vested in Middletown on the death of Mrs. Radford. State v. Roberts, 21 N.J. 552 (N.J. 05/21/1956).

[47] "Prejudgment interest is not a matter of right, it is allowable as within the broad discretion of a trial judge to accomplish justice in accordance with equitable principles." Ellmex Con. Co. v. Republic Ins. Co., 202 N.J.Super. 195, 209 (A.D. 1985)

# S

**Reasons for Reconsidering this Court's Order**

This argument is directed to this Court's order converting appellant's notice of appeal as of right, to a notice of petition for certification. Appellant filed for an appeal as of right because the trial record shows the judge denied appellant his right to make an opening statement. R. 2:2-1(a)(1)&(4). He also allowed an ex parte communication that affected the outcome of the trial. These issues reveal a substantial question arising under state and federal constitutions. R. 2:2-1(a)(1)&(4)[2] By allowing an ex parte contact, the judge violated Canon 3A(6) and engaged in **"conduct prejudicial to the administration of Justice"**[3]. This error is sufficiently blatant to prove bias,[4] and a denial of due process,[5] which renders the trial a structural error that requires **"automatic reversal"**. Neder v. U.S., 527 U.S. 1 (U.S. 1999) (biased trial judge).

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[2] "We have long held that **an appeal as of right is maintainable only where the record reveals a substantial rather than merely a colorable question arising under the federal or state constitutions** that has not been the subject of a conclusive judicial determination." Essex County v. Hindenlang, 24 N.J. 517 (1957); Klotz v. Lee, 21 N.J. 148 (1956); Colacurcio Cont. Corp. v. Weiss, 20 N.J. 258 (1955); State v. De Meo, 20 N.J. 1 (1955). In re East Windsor Mun. Util. Auth., 57 N.J. 168, 170 (N.J. 11/09/1970).

[3] Canon 3A(6) prohibits a Judge from either initiating or considering ex parte or other communications concerning a pending or impending proceeding. We find that respondent has violated Canons 1, 2, and 3, and has engaged in "conduct prejudicial to the administration of Justice that brings the judicial office into disrepute." R. 2:15-8(a)(6). Matter of Carton, 140 N.J. 330 (1995).

[4] State v. Marshall, 148 N.J. 89 (N.J. 03/05/1997) ("An error might be sufficiently blatant, and so lacking in an alternative, good faith explanation that the error would support a charge of bias.")

[5] "We have held that the Due Process Clause requires an impartial judge." Albright v. Oliver, 510 U.S. 266, 114 S.Ct. 807, 127 L.Ed.2d 114 (U.S. 01/24/1994).

## T

### Reasons Why Certification Should be Allowed

The interest of justice requires a grant since the ex parte contact affected the outcome of the trial and the judge's rulings on other issues. Moreover, the judge lacked jurisdiction to rule on quantum meruit and interest,[1] which raises a question of general public importance that has not been settled by this Court. The failure to allow opening statements was a manifest injustice. The judge's actions also violated prior Supreme Court rulings.

### Comments on the Appellate Division's Opinion

**The Appellate Division abdicated its constitutional duty by not ruling on appellant's structural error argument and by avoiding the ex parte issue though it was presented in appellant's opening brief to that court.** Nor, did the Appellate Division address appellant's argument on opening statements, which appeared in that same brief. These issues prompted appellant to file a Notice of Appeal as of right pursuant to R. 2:2-1(a)(1) & (4), only to have this Court prematurely order that it be treated as a petition for certification. The Appellate Division did not refer to these issues in its opinion, thus concealing material facts. It also erred on other issues, which will be addressed in appellant's arguments.

### Certification of Good Faith

I hereby certify that this petition presents a substantial question and is filed in good faith and not for the purposes of delay.

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[1] "Reversed on grounds of lack of jurisdiction in Hanson v. Denckla , 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2 d 1283 (1958). Matter of Estate of Joseph Damato, 86 N.J.Super. 107, 114 (App.Div. 01/05/1965).